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No. 11803

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In The United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

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STATEMENT CONCERNING JURISDICTION

The appellant was indicted (Tr. 2) on three counts of violation of Section 145(b), Title 26, United States Code, and was convicted on all counts (Tr. 476). The jurisdiction of the United States District Court is sustained by provisions of Title 28, Section 41, of the United States Code Annotated, and the jurisdiction of this Court by the provisions of Title 28, Section 723(a), United States Code Annotated, and the rules promulgated by the Supreme Court of the United States pursuant thereto.

STATEMENT OF THE CASE

There are three counts in the Indictment charging the defendant, John Barcott, with having wilfully and knowingly attempted to defeat and evade the payment of a large part of his income and victory tax for the years 1943, 1944 and 1945. (Tr. 2, 3, 4, 5). Each of the counts refers to a different year. The allegations are the same except as to amount.

Count No. 1 charges that the defendant "did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year 1943 by filing and causing to be filed * * * a false and fraudulent income and victory tax return wherein he stated that his net income for said calendar year, computed on the community - property basis, was the sum of $6,720.40 and that the amount of tax due and owing thereon was the sum of $1,545.38, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $12,406.33, derived as follows:

Dividends	$	140.00
Interest		141.93
Interest on bonds		200.00
Income from business		24,621.96" (Tr. 2, 3)

Count No. 2 is identical except as to amount. It is charged in Count No. 2 that the defendant's reported

income was $5,632.57, whereas his income was $9,-926.61, which income was derived as follows:

Dividends and interest	$	818.27
Income from business		20,034.94 (Tr. 3, 4)

Count No. 3 charged that the defendant reported income of $7,388.98, whereas his income was $11,-138.92, derived as follows:

Dividends and interest	$	1,258.74
Income from business		22,019.09 (Tr. 4, 5)

Defendant moved for a Bill of Particulars (Tr. 11); the Court granted the same and the plaintiff furnished a Bill of Particulars, enumerating the sources from which the defendant derived his income. (Tr. 17, 18). It is set forth that the sources of income were the following:

(1) Dividends from stock holdings in Fishermen's Packing Corporation, Anacortes, Washington.

(2) Interest on savings account in the National Bank of Washington and from a real estate and conditional sales contract.

(3) Interest on United States Savings Bonds, Series "G."

(4) Income from business from a restaurant business known as the "California Oyster House," 914 Pacific Avenue, Tacoma, Washington.

The Bill of Particulars in relation to Counts Nos. 2 and 3 sets forth that the income was from the same sources.

To this Indictment the defendant entered a plea of not guilty. The case proceeded to trial and the theory of the Government is clearly set forth in the opening statement to the Jury by the United States District Attorney.

> "This case, when it will be—when it is finally presented to you will be classed what we term a case proven by the net worth process; that is, in finding out what a man owns at the beginning of any particular year and then checking that against what he owns at the end of that particular year, * * * and the difference between the net worth at the end of the year and the net worth at the beginning of the year, is what the Government claims his income must have been." (Tr. 63, 64).

Also reiterated in the Court's instruction to the Jury:

> "The Government therefore relies upon the fact that when an increase is shown (net worth) it has established substantially that such income was taxable income in each of the years 1943, 1944 and 1945."

The evidence which the Government presented to convict the defendant of the charge made in the Indictment is confined entirely in the testimony of two witnesses, Nielsen (Tr. 72), and Swanson (Tr. 116). There is no claim that the defendant did not report all the dividends and interest received by him. The income tax returns made for the years 1943, 1944 and 1945 show that the defendant had reported all the dividends and interest as income. (Pltfs' Exhibits 1, 2, 3).

Stanley Nielsen, Special Agent of the Department of Internal Revenue, testified that a local bank had informed the department that the defendant had purchased several one thousand dollar bills, and that he called upon the defendant to discuss the official assignment in reference to these bills, and that he informed the defendant that the purpose of his investigation was to determine if this money was used in black market activities and if the same was properly reported for income tax purposes. (Tr. 71, 72). The defendant offered to open the safe deposit box and show him these bills. Accordingly, they went to the safe deposit box, it was opened, and he found therein $23,000 in cash and about $75,000, par value, Government bonds. (Tr. 73, 74). He testified while he was inventorying the contents of the box the defendant said to him, " 'Here, Nielsen, let me give you one of these,' and pushing a package of currency containing five hundred dollars to me, and, 'You make a favorable report on this matter and just forget about the whole thing,' and I told him, 'No, Mr. Barcott, I can't do that. I must inventory this stuff,' so I continued to inventory the bonds." That the defendant approached him again and said to him, "Now, Nielsen, we are alone—only two of us, can't you take a package of this and make a favorable report on it?" (Tr. 75). That he again approached him and said to him, "I feel sick inside, let me buy you a suit of clothes, and your wife a fur coat, and you take this money

and make a favorable report on me." That the witness informed the defendant that by his action he was practically walking into jail. Objection to the testimony was overruled and a motion to withdraw it from the consideration of the Jury and to instruct the Jury to disregard it was denied. (Tr. 83).

The foregoing is the substance of the testimony of the witness Nielsen to sustain the allegations set forth in the Indictment.

The witness Washburn (Tr. 87) testified concerning interest received by the defendant from savings account and real estate and conditional sales contract, which interest was duly reported as shown by the income tax returns, on which no question is raised.

The witness Kerr (Tr. 102) testified concerning the defendant having a safe deposit box in a vault owned by him and that he entered the vault on January 28, 1946. (Exhibit No. 11).

The witness Plancich testified concerning dividends received by the defendant, which dividends were duly reported, and there was no question raised. (Tr. 104).

The witness Corbin testified (Tr. 111) that at the request of the defendant she, as Deputy Collector of Internal Revenue, prepared income tax returns for the defendant for the years 1943 and 1944; that the defendant furnished the figures, but he did not have any books with him; that he furnished her all of the necessary information to make up the income tax return.

The witness Hary Swanson (Tr. 114), Special Agent of the Department of Internal Revenue, testified that he, with Mr. Nielsen, and the defendant Barcott, went to the safe deposit box in the National Bank of Washington, to which the defendant freely gave him access, and he inventoried the contents of the box. After inventorying the contents of the box he inquired of the defendant if he had any other safe deposit box, to which the defendant replied that he did, in the Washington Building. That they thereupon proceeded to the Washington Building, opened the box for inspection, and found some business and insurance papers and nothing more. (Tr. 115). That he audited the income tax returns for 1934, 1944 and 1945, the bank accounts of the defendant, interest collected by him and dividends. That after examining all sources of information he then proceeded to determine the current income of the defendant. His whole testimony can be summarized by the following quotations:

"Q. And what method did you use in establishing this income?

A. This income was determined on the increase in net worth basis.

Q. And explain to the Court just exactly what you mean by that?

A. The net worth basis is the basis used in determining income where complete and adequate records are not maintained by the taxpayer. The

income is computed on the difference between the net worth of the taxpayer at the beginning of the year and the net worth at the end of the year, the difference constituting income, provided of course, that as far as it is able to be determined it comes from a taxable source, such as salaries, wages, dividends, interest, business income, or rents. This was done in the case of John Barcott, as his records did not appear adequate to make a complete and detailed audit as such.

Q. And what did you find—then you started your account as of December 31, 1942, is that correct?

A. Yes, or similarly, January 1, 1943.

Q. And then did you compute it for each year thereafter until December 31, 1945?

A. I did.

Q. Do you have your working figures with you there? A. Yes, I do.

Q. Will you state what you found to be the net worth, and what items composed it, as of December 31, 1942?

MR. GAGLIARDI: I'm objecting, Your Honor, unless he shows what sources he has derived this information. We ought to at least know where he got his information what our net worth was on December 31, 1942, before he draws his conclusion by saying that that's all we were worth. I'm objecting to that. (Tr. 116, 117).

* * *

Q. Please state the items and what his net worth was according to your figures on December 31, 1942.

A. The net worth as of December 31, 1942, was determined to be $57,278.56.

Q. And just explain the items and the source of your information concerning those items, so that they total up to $57,000 some odd dollars.

A. The first item on hand was cash in the safety deposit box at the time I checked it on February 13th, of $23,000, consisting of—

MR. GAGLIARDI: Just a minute. If Your Honor please, I would like to know the year. February 13th of what year?

THE WITNESS: 1946.

MR. GAGLIARDI: You were talking about 1942. You are talking as to value in 1942, it was determined how much Mr. Barcott was worth on January 1, 1942, by testimony of information which you got out of the box in 1946.

THE COURT: He has testified that he found his net worth in January '42 to be $57,000 plus. (Tr. 119).

* * *

THE COURT: The objection will be overruled, and exception allowed. You will have an opportunity to cross-examine as to how he arrived at his conclusion.

Q. My understanding, Mr. Swanson, is to the effect that the date you are talking about is December 31, 1942, is that correct?

A. That's right.

Q. Not January, 1942. This is December 31, 1942. A. December 31st.

Q. And the $23,000 item of cash is the same amount of cash that you found in a safe deposit box in January of 1946, is that correct?

A. That's right. (Tr. 120).

* * *

Q. You were not charged him with income of $23,000, you are giving him the idea that he had the $23,000 on December 31, 1942.

A. That's right, I was giving him credit for it at the beginning of the period.

Q. In other words, you are not charging him over the period at all. A. That's right.

Q. All right, now what is the next item that you have to make up this $57,000?

A. Savings account at the National Bank of Washington, number 64787.

Q. How much does that amount to?

A. As of December 31, 1942, according to the records of the bank, there amounted to $2,279.53. (Tr. 121).

* * *

Q. And in inventorying the contents of the box you found something like $75,000 worth war bond?

A. That's right.

Q. $23,200. A. $23,000.

Q. $23,000 in cash? A. That's right.

Q. Then you examined the date of the war bonds?

A. That's right.

Q. And after you examined the date, you assumed that Mr. Barcott, all he had in that box in December 31, 1942, was $23,000?

A. That's right.

Q. You had no other information but your own assumption? A. That's right.

Q. Then the bonds were purchased after January 1, 1943. The bonds that you inventoried were purchased after January 1, 1943?

A. No, sir, that's not quite true. We inventoried all that were in the box, some were purchased prior to that date.

Q. Some were purchased prior to that date, and some were purchased prior—after that date?

A. Yes, that's right.

Q. Those who were purchased prior to that date, you assumed that he had them before January 1, 1943?

A. We—from the issue date we determined they were purchased at a certain time, and if they were issued prior to January 1, 1943, we assumed they were purchased prior to January 1, 1943.

Q. And what he purchased after January 1, 1943, then you assumed he purchased on that time?

A. At the issue date, yes, sir.

Q. Issue date. And you assumed that he got that money from the business?

A. Yes, I had no other knowledge.

Q. You had no other knowledge, you made no other inquiry?

A. I made other inquiry, yes, sir.

Q. Where did you inquire?

A. We inquired from Mr. Barcott, he was asked numerous times after the first contact, if he had any other source of income.

Q. Just asked the sources of income?

A. That's right.

Q. Did he tell you that he had been in business since 1919?

A. That's right.

Q. That he, his wife, and his son, operated the restaurant since 1919 continuously, the California Oyster House?

A. I am not sure about the other members of his family, but he said that he had operated the restaurant—

Q. Didn't he say he and his wife and the two sons operate it?

A. He said his wife had been there part of the time.

Q. Yeah. You in determining the net worth of Mr. Barcott assumed that in January 1, 1943, he only had $23,000 in cash, and whatever bond he had purchased prior to that time, and also the real estate and the restaurant?

A. That was all, yes.

Q. And that's purely assumption? There is nothing upon which you could base any facts?

A. Oh, yes, they were assets which were examined.

Q. Were examined?

A. Purchased at a certain date.

Q. And because they were purchased on a certain date, then you assumed they were acquired by earning after that date—prior to that date?

A. Prior to that date.

Q. And it must have been earned before the —between the first of January and the date in which they were purchased in 1943? See if I make myself clear. Any bond which he purchased during the year 1943, you assumed that was income that he received from the first of January during the year up to the date he purchased the bond.

A. That's right.

Q. You had no information whatever what asset that Mr. Barcott had prior to January 1, 1943, whether it was in cash, bond, mortgages or other property?

A. Well, that's not true.

Q. Do you have any information—?

A. We examined the savings account back to the time that he first started, then we examined the conditional sales contract back to the time he stated, then the real estate contract, and such bonds that were still in the box—the inventory date, if they were purchased prior to January 1, 1943, they were examined.

Q. But so far as pertaining to the cash in which he purchased additional bond in 1943, and additional bond in 1944 and '45, you had no information where the money came from except what you assumed that it came from the business?

A. I assumed it came from the business." (Tr. 135-139).

He further testified that in arriving at a net worth of the defendant he had examined the records in regard to income tax returns made by the defendant from 1919 to 1942; that during such period he could have earned $89,000, and that he did not have any records for the year 1942, because in the year 1942 the taxes were forgiven, and that he did assume that was all he earned during that period and he did not have any knowledge in regard to Mr. Barcott's assets prior to his entering the business, nor did he take into consideration that during all that time the wife of the defendant and his sons worked in the restaurant. His testimony can be summarized by the following questions and answers:

"Q. And also then, you assume that when he went into business in 1919 he didn't have any money?

A. That's right, under this computation.

Q. And also you assume that Mrs. Barcott—

A. May I clarify that, just a second? I stated at the beginning that this was determined from the records of the Collector of Internal Revenue, and that is the first year for which they had a

record of a return being filed. Now, it might be that he had filed prior to that.

Q. I see, but in 1919 when he went into business, you have no knowledge of how much money he had to start in business? A. No, sir.

Q. And you did not know how much money Mrs. Barcott had? A. No, sir.

Q. And you didn't know how much Mrs. Barcott's mother left her when she died, did you?

A. No, sir. Mr. Barcott was asked for the information — rather, that information, but he never volunteered it.

Q. All of these taxes that you have given the Court and jury the benefit of knowing that were not paid, were on the assumption that Mr. Barcott had nothing else on January 1, 1943, except what you say was in the box, at that time?

A. A tax is computed on the increase of certain items.

Q. Increase during those years?

A. During those years, not—it wouldn't matter a bit if the amount was less. It's only on the increase that a man makes from the beginning of the year and the end of the year. So the amount that you start with is of little or no consequence for the purpose of determining the increase of that year.

Q. And the increase, you mean to say, the additional asset acquired during the year?

A. That's right.

Q. And where the money came from, you have no knowledge, except what you assume it came from the business?

A. We—as far as we know, it came from the business, and we had no other source to the amount during those years.

Q. You have no other knowledge—?

A. 1943, '44 and '45. No, sir, except from the dividends and interest." (Tr. 148, 149).

The foregoing is the substance of all the testimony upon which the Government relied to convict the defendant of the crime charged in the Indictment.

At the conclusion of the Government's case the defendant moved the court to dismiss the action, or in the alternative to direct the Jury to return a verdict of acquittal and to enter a judgment of acquittal against the defendant on the ground that the Government had failed to introduce sufficient evidence upon which to sustain a conviction against the defendant for the crime charged in the Indictment. (Tr. 153-165).

The defendant took the stand in his own behalf and testified that he entered the restaurant business in the year 1919; that at the time he had $6,000 (Tr. 177); that for a period of 18 years his wife worked in the restaurant with him; that the family took their food from the restaurant and from "tips" received by his wife as a waitress; that he lived a very modest life, having a home costing $3,100; did not drink, smoke or gamble, and never owned an automobile; that his two sons worked with him in the restaurant from time to time without pay; that he made a profit from $7,000

to $9,000 in a fishing boat venture in previous years. He submitted his books from 1943 to the present time showing his income and expenditures for those years. (Def's. Exs. A-1 and A-2). That he received no greater income from the restaurant than that which was reported for the years in question. (Tr. 221). That Thomas Ray was his attorney and that at the time of Mr. Ray's death, in July, 1943, defendant's books of record were in Mr. Ray's possession for the purpose of compiling State Security Compensation taxes. That after the death of Mr. Ray he was unable to recover his books. It is stipulated in the record that Mr. Ray died and that at the time of his death he had the defendant's books, and that the files and records of Mr. Ray had been lost or destroyed. It was further testified that his earnings from the business from the date he enterd business in 1919 was an average of $250.00 to $400.00 per month, with the exception of the war years, which were greater. (Tr. 186).

Mrs. Barcott testified that she brought into the community $6,000; that their home expenses were never any greater than $50.00 per month after taking all of the food and provisions from the restaurant; that she received an average of not less than $7.00 per day from tips, and that at the time of her mother's death she received the sum of $2,700. (Tr. 200).

Robert Birch, Certified Public Accountant, testified that upon analyzing defendant's earnings from the

date he entered business his earnings should have been $173,737.00, and that taking into account the initial investment of the defendant and his wife, the profit made upon the boat venture, and deducting living expenses, he testified that the defendant's net worth on December 31, 1942, should have been not less than $99,733.21. (Tr. 377).

The witness Anton Barcott testified that he worked in the restaurant for several years and he received no pay; that his parents were very frugal, and that all the food for the family was furnished from the restaurant. (Tr. 324, 329).

The witness Pearl McCord testified that she worked in the restaurant and that she received an average of $5.00 per day in tips. (Tr. 344).

The witness Marie Dascher testified that she worked in the restaurant and received an average of $7.00 per day in tips. (Tr. 350).

During argument counsel for the prosecution stated that if people feel they can walk into a Court Room like this and walk out and get away with what this man did they do not believe in our system of Government any more. (Tr. 434). Upon objection to the prejudicial and improper argument the Court stated that, "The last remark of the counsel the Jury will disregard." (Tr. 435).

At the conclusion of the testimony the defendant

moved for judgment of acquittal, which motion the court denied and allowed an exception (Tr. 408, 409), whereupon the court instructed the Jury, exception was taken to the refusal of the court to give certain instructions and to certain instruction given by the Court, and exception allowed. The Jury returned a verdict of guilty on all three counts, motion for judgment of acquittal, or in the alternative for a new trial, was interposed and denied and exception allowed, and defendant was committed to the custody of the Attorney General of the United States, to be confined in such Institution to be designated by him for a period of ten months on each of the counts, the sentence to run concurrently, and to pay a fine of $750.00 on each count. From the judgment and sentence this appeal is prosecuted.

QUESTIONS INVOLVED

I.

Where a defendant is charged with the crime of having wilfully attempted to evade the payment of income tax by failing to report all of his income derived from named and specified sources, and the evidence shows that during a specified year the defendant acquired more war bonds than could have been purchased by the earnings reported by him during that year, without any further showing, is that evidence sufficient to justify the Trial Court in submitting the case to the jury?

The Trial Court answered "yes."

II.

Where the Indictment and the Bill of Particulars charge the accused with having committed the crime of wilful attempted evasion of payment of income tax for a particular year, which income had been derived from a named business and specified investments, and the evidence does not show that the defendant failed to report any of the income from the sources named in the Bill of Particulars, but does show that the defendant acquired more war bonds than could have been purchased with his reported income for that year, is there such a failure of proof to sustain the allegations of the Indictment, or is there such a variance between the allegations and the proof as to make it the duty of the Trial Court to take the case away from the Jury and enter a judgment of acquittal?

The Trial Court answered "no."

III.

Where the Indictment charges the defendant with wilfully and knowingly evading the payment of income tax on income derived and received from specified sources and the evidence introduced in support thereof shows that the defendant during the taxable year had acquired assets greater than the reported income, without further showing the sources from where such funds were derived, is said showing sufficient to make out a prima facie case upon which to sustain a

verdict of guilt and place upon the defendant the burden of proving that such other assets were acquired and purchased with funds derived from sources other than current income?

The Trial Court answered "yes."

IV.

Where evidence is introduced to show that at the time the defendant was being investigated for several different crimes he made an offer of bribe to the investigating officer, can such evidence of attempted bribery be introduced into the case on the theory that it shows consciousness of guilt of the crime for which he is subsequently charged?

The Trial Court answered "yes."

V.

Is the fact that the defendant was the owner of a safe deposit box and that he entered said safe deposit box two weeks before the agent examined the same, without any showing that the defendant had either taken or placed anything in the box, admissible evidence against the defendant to support the crime for which he is being tried?

The Trial Court answered "yes."

VI.

Where the United States Attorney appealed to the passion and prejudice of the jury by requesting conviction of the defendant on the theory that if they

failed to convict they are not believers in our present system of Government, is a mere statement from the Trial Court telling the jury to disregard the last remark sufficient to cure the error and safeguard the defendant from the prejudice?

The Trial Court answered "yes."

ASSIGNMENTS OF ERROR

I

The Court erred in disallowing the defendant's motions, all going to the sufficiency of the evidence:

(a) In denying defendant's motion for judgment of acquittal at the conclusion of respondent's case. (Tr. 153-165).

(b) In deyning defendant's motion for judgment of acquittal at the conclusion of all evidence. (Tr. 408-409).

(c) In denying defendant's motion for judgment of acquittal, or in the alternative for a new trial. (Tr. 458-468).

II

The Court erred in overruling defendant's objections to the witness Swanson's testimony pertaining to defendant's net worth as of December 31, 1942, as said witness's conclusion in this regard is based only on an examination of assets made in 1946, from which he makes general assumptions. (Tr. 117-119).

III

The Court erred in denying defendant's motion to strike the testimony of the witness Nielsen purporting to be a bribe (Tr. 76-77), where the predicate to said testimony showed that defendant was being questioned relative to certain bank notes and was being investigated for several different crimes.

IV

The Court erred in failing to limit the prosecution to a showing that unreported income, if any, was derived from the sources set forth in the Bill of Particulars. (Tr. 166-171).

V

The Court erred in allowing Exhibit No. 11 pertaining to defendant's entry into a safe deposit box to be admitted in evidence. (Tr. 104).

VI

The Court erred in failing to give defendant's requested Instruction No. 2, and thereby failed to instruct the Jury that they must find that the war bonds purchased by the defendant were acquired with net income derived by the defendant from the sources set forth in the Bill of Particulars. (Tr. 29-32).

VII

The Court erred in instructing the Jury that the defendant could be convicted if it were shown to them that the defendant purchased war bonds in excess of his reported income for a taxable year. (Tr. 450-451).

VIII

Prejudicial error which could not be cured by an instruction from the Court to the Jury to disregard counsel's remark was committed by counsel for the prosecution when he in substance told the Jury that a failure to convict would indicate they did not believe in our system of Government any longer.

ARGUMENT

ASSIGNMENT OF ERROR NO. I

The Court erred in disallowing the defendant's motions, all going to the sufficieny of the evidence:

(a) In denying defendant's motion for judgment of acquittal at the conclusion of respondent's case. (Tr. 153-165).

(b) In denying defendant's motion for judgment of acquittal at the conclusion of all evidence. (Tr. 408-409).

(c) In denying defendant's motion for judgment of acquittal, or in the alternative for a new trial. (Tr. 458-468).

ASSIGNMENT OF ERROR NO. II

The Court erred in overruling defendant's objections to the witness Swanson's testimony pertaining to defendant's net worth as of December 31, 1942, as said witness's conclusion in this regard is based only on an examination of assets made in 1946, from which he makes general assumptions. (Tr. 117-119).

As the argument on the sufficiency of the evidence is so interrelated with the testimony of the witness Swanson, Assignments of Errors Nos. I and II are discussed together.

Although the transcript of record in this case is somewhat lengthy, the issues involved are relatively simple. Defendant is charged with attempted income tax evasion. The Indictment and Bill of Particulars set out wherein he purportedly failed to report his true income and in what amounts. Defendant is apprised of the charges as particularized and enters a plea of not guilty.

The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecution the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *"

Relying on the Constitution Amendment, he expected the Government to confine itself to the charge and to prove a substantial amount of evasion before he was even called on to utter a single word. *O'Brien v. United States*, 51 F. (2d) 193.

The prosecution in substance proved that defendant purchased U. S. War Bonds in excess of his income and therefore assumed that the money for said purchase was earned during the same year; then basing one assumption on another, assumes that the money was earned from defendant's restaurant business.

The entire case, if any there be, is made out by the prosecution's witness Swanson, as is clearly stated by counsel for the prosecution:

> "Now as far as our case is concerned, it is all contained in one witness, and that is Mr. Swanson, here." (Tr. 415).

An examination of Swanson's testimony reveals that in the year 1946 he made an inventory of such of the defendant's assets as were visible to him. Those assets which were shown to have been acquired in 1945 were deducted from the total figure. Then those which indicated acquisition in 1944 were again deducted. Following this procedure once more for the year 1943, the witness arrived at a figure which he called "net worth" as of December 31, 1942. Asked what method he used in establishing the defendant's income, he answered as follows:

> "This income was determined on the increase in net worth basis." (Tr. 116).

Defendant objected to a calculation of net worth on this basis. (Tr. 119). The Court overruled the objection, saying:

> "I don't really want an argument. Now I understand the position you take, and I am overruling your objection and allowing you an exception, so we will get along." (Tr. 119).

He then testified defendant's net worth as of December 31, 1942, was $57,278.56. (Tr. 119).

The witness could not find any unreported income from the restaurant business from an examination of defendant's bank account. Pertaining to the restaurant bank account he testified as follows:

"Q. How much did you credit him there?

A. That was estimated at a thousand dollars.

Q. And how do you estimate it at a thousand dollars, and tell the jury why you estimated it?

A. That was an average monthly balance. The reason it was taken at a thousand dollars, it remained at an average figure like that, such as—through the entire period. It showed no accumulations and no large disappearance. Just a general business account." (Tr. 121).

Referring to the year 1943 Swanson again states that the restaurant bank account ran at around $1,000.00, indicating no unusual or unreported income. (Tr. 125). There was a purchase of $20,750 in bonds during this year and Swanson calculated a net worth increase of $21,928.10. (Tr. 127). Of course defendant reported $6,720.40, which was one-half of the community earnings, making a total reported of $13,440.80 for the community.

In 1944, again no increased value or unusual or unreported deposits can be found in the bank account. (Tr. 128). Bonds in the sum of $19,000 were purchased (Tr. 128) and net worth purportedly increased $18,256.09. (Tr. 129). In this year there was a total community reported income of $11,265.14.

Bonds in the sum of $20,000 were purchased in 1945 (Tr. 129) and there was a purported increase in net worth of approximately $19,000. The checking account still shows no unreported earnings from the restaurant. (Tr. 129). In this year $14,777.96 was reported by husband and wife. (Tr. 5).

The witness is quite frank in stating his calculations are not based on facts but rather on assumptions. It was an assumption that defendant had only $23,000 in cash on December 31, 1942.

"Q. And after you examined the date, you assumed that Mr. Barcott, all he had in that box in December 31, 1942, was $23,000.

A. That's right.

Q. You had no other information but your own assumption?

A. That's right." (Tr. 136).

He also assumed that the money was earned the same year that bonds were purchased and that it came from unreported earnings of the restaurant.

"Q. And what he purchased after January 1, 1943, then you assumed he purchased on that time?

A. At the issue date, yes, sir.

Q. Issue date. And you assumed that he got that money from business?

A. Yes, I had no other knowledge." (Tr. 136).

Again he states:

"Q. And it must have been earned before the —between the first of January and the date in which they were purchased in 1943? See if I make myself clear. Any bond which he purchased during the year 1943, you assumed that was income that he received from the first of January during the year up to the date he purchased the bond?

A. That's right." (Tr. 138).

And further in this regard:

"Q. But so far as pertaining to the cash in which he purchased additional bond in 1943, and additional bond in 1944 and '45, you had no information where the money came from except what you assumed that it came from the business?

A. I assumed it came from the business." (Tr. 138, 139).

Swanson then testified that defendant could have earned $89,291.09 up to the end of 1942, according to his calculations. (Tr. 143). Then he takes $36,000 from this figure, assuming again that defendant's living expenses were $125.00 per month. (Tr. 144).

He also assumes defendant was penniless when he commenced business in 1919, and that defendant's wife had no money:

"Q. And also then, you assume that when he went into business in 1919 he didn't have any money?

A. That's right, under this computation.

* * *

Q. I see, but in 1919 when he went into business, you have no knowledge of how much money he had to start in business?

A. No, sir.

Q. And you did not know how much money Mrs. Barcott had?

A. No sir." (Tr. 148).

In explaining his theory of arriving at unreported income the witness with utmost candor shows he was not interested in anchoring his basis for "net worth" on a known, proven or admitted net worth foundation, but that he was guided by what appeared to him as an increase during a specific year. He says as follows:

"It's only on the increase that a man makes from the beginning of the year and the end of the year. So the amount that you start with is of little or no consequence for the purpose of determining the increase of that year." (Tr. 149, 149).

That's the testimony which "made out" plaintiff's case. That's what supposedly proved we had unreported income for the years in question; that we cheated the Government by withholding profits from our restaurant business. It is on this testimony that appellant today stands convicted.

The following is a quotation of elementary law with which we are all familiar:

"Throughout all criminal trials, the burden rests upon the prosecution to prove the guilt of

> the accused, or, in other words, to prove each and every material element of the offense charged, beyond a reasonable doubt, and this burden never shifts from the prosecution." Wharton's Criminal Evidence, Vol. 1, Sec. 195, p. 207.

Swanson's testimony shows only that our purchase of U. S. War Bonds during war years exceeded our income for the years in which the bonds were purchased. There is not a scintilla of evidence from which it can be deduced that the bonds were purchased with income from the current year, much less that any income was not reported for taxation purposes.

The law is well established in our federal system of jurisprudence that facts which are equally consistent with innocence as with guilt cannot serve as the basis of a criminal prosecution. The rule is set out as follows in *Nicola v. United States*, 72 F. (2d) 780 at page 786:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. *Union Pacific Coal Co. v. United States*, 173 F. 737, 740 (C.C.A. 8); *Wiener v. United States*, 282 F. 799, 801 (C.C.A. 3); *Yusem v. United States*, 8 F. (2d) 6 (C.C.A. 3); *Ridenour v. United States*, 14 F. (2d) 888 (C.C.A. 3)."

Is the purchase of war bonds in a greater amount than is one's income for a specific year inconsistent

with any other hypothesis but that of guilt? Is it not reasonable to buy war bonds from savings previously acquired? Is it not just as consistent with innocence that the purchase of these bonds was partly with current earnings and partly with savings? The answers are self-evident and show the ephemeral position taken by the prosecution in this case. Let us, just for a moment, image how many other American citizens, who in the hour of our nation's greatest crisis, dipped deeply into their savings, far in excess of their current incomes, to contribute to their country's cause. The number of prosecutions possible would reach fantastic proportions. Does the law contemplate that such people are *prima facie* criminals; and that proof of purchase exceeding current income is sufficient to make out a criminal case against them?

It seems to us that our Constitution still has meaning, force and effect and that we have not yet stooped to the level, and that the time has not yet arrived, where a citizen must prove his innocence in an American court.

We have examined all of the reported cases and have been unable to find a single case in which it was even attempted to prove guilt on the basis of increase in assets in excess of reported income for a current year.

In the case of *Nicola v. United States*, 72 F. (2d) 780 (C.C.A. 3, 1934) defendant, who was the president of two companies known as the Miller Company

and the Point Company, was indicted for failing to report profit on a $675,000 sale, which sale was made through the Point Company and was reported by said Point Company. The Government's testimony showed that negotiations and sale were conducted on the part of the Miller Company by its directors, two meetings being held, the first one at the Miller Company and the later one at the Point Company. As the Court remarked at page 785:

> "This testimony was, of course, a circumstance which was properly in the case, but it had no probative value. The purpose of it was to show that the defendant was not only instrumental in effecting the sale, but that he did it for himself personally and not for, and as president of, the Point Company. Either might have been true, but it is significant that the last meeting, where the sale was consummated and final 90 per cent. of the purchase price, $607,000, was paid, was held in the building of the Point Company, rather than at the office of some one of the defendant's other companies which admittedly had no connection with this transaction." *Nicola v. United States*, 72 F. (2d) 780, p. 785.

The Circuit Court applied the rule that the transaction was as consistent with innocence as it was with guilt:

> "Before the jury could find the defendant guilty, the government had to establish beyond a reasonable doubt that the defendant had not made the allotment when the negotiations for the sale actually began. The defendant did not have to prove himself innocent by showing that he had made the allotment. He could stand mute until the government had established his failure thus

to make the allotment beyond a reasonable doubt." *Nicola v. United States,* 72 F. (2d) 780, p. 788.

In *Paschen v. United States,* 70 F. (2d) 491 (C.C.A. 7, 1934) the figures from a very large bank account which defendant maintained under an assumed name were introduced in evidence as proof of income during the current year which he failed to report. The Court very properly reached the conclusion that this bank account of itself, without some evidence as to where the money came from and that it was earned in the taxable year, could not be used to show income tax evasion. The specific language used by the Court in this regard is as follows:

> "The Anderson account was as much Paschen's own account as if it had been carried in his own name. About this there is no controversy. But as to the unidentified balance appearing to have been deposited in the Anderson account during that year, we believe it involves too much of speculation to admit of indulgence in the presumption that, because a few of the items making up the large Anderson account were shown to have been of commercial accounts not included in the tax return, it therefore follows that the large unidentified balance of deposits in the account represents also commercial accruals during the year, not included in the tax return. This contention of the Government cannot be allowed." *Paschen v. United States,* 70 F. (2d) 491, p. 497.

The only logical conclusion which we can reach from the foregoing analysis of the evidence and from the authorities cited is that the defendant purchased war bonds in excess of reported income for a given year,

from which it is impossible to deduce that the purchase of bonds was made from unreported earnings of the taxable year in question, much less that said purchases are not consistent with any theory but guilt.

THE WITNESS SWANSON'S TESTIMONY AS TO DEFENDANT'S NET WORTH HAS NO BASIS IN FACT

Assuming the Government had pleaded net worth as its basis for prosecution, and further assuming that the theory is sufficient to permit conviction for crime, has the prosecution submitted any evidence upon which the defendant's increase in net worth during the specified years can be determined?

It is to be remembered that the witness Swanson first saw defendant in 1946 and he made an attempt to figure out defendant's net worth as of December 31, 1942, from what assets he examined in 1946.

It seems that the basic figure, the one upon which subsequent calculations are going to be made, must be positively established before any calculations of subsequent net worth could be made. This is a matter of plain logic. If the basic figure is erroneous or improperly determined the entire structure fails.

We must again call the Court's attention to the fact that there is no testimony in this case which even attempts to show defendant's net worth as of December 31, 1942, except on assumption made by a man from assets he examined more than three years later. In

reaching his conclusion, the witness states he does not know how much cash the defendant may have had in December of 1942. The witness does not consider what cash defendant had when he commenced business or how much his wife brought into the community. In other words, defendant's basic net worth as of December 31, 1942, is based only on speculation, surmise and assumption.

Our courts of law have not arrived at the point where they will admit as competent evidence opinions and conclusions which are based on incomplete knowledge of the facts, on assumption, and on conjecture. As is stated in 20 Am. Jur., page 667:

> "It is necessary, however, that the facts upon which the expert bases his opinion or conclusion permit reasonably accurate conclusions as distinguished from mere guess or conjecture."

To sustain our contention that defendant's net worth as of December 31, 1942, was not established, the preceding analysis of Swanson's testimony seems ample in this regard. By Swanson's own statement given in explanation, wherein he said in substance that he looks only to the year to year increase of visible assets and doesn't care what a man may have accumulated over a long period of years or how earlier obtained assets may have been converted into other assets so as to subsequently appear in different form, must conclusively show to this Court the inadmissibility of such evidence.

ASSIGNMENT OF ERROR NO. III

The Court erred in denying defendant's motion to strike the testimony of the witness Nielsen purporting to be a bribe (Tr. 76-77), where the predicate to said testimony showed that defendant was being questioned relative to certain bank notes and was being investigated for several different crimes.

An analysis of the evidence reveals defendant was not convicted because there was any evidence of his wrongdoing, but in fact he was found guilty by reason of the introduction of highly prejudicial evidence which had no bearing on the issues, consisting principally of the witness Nielsen's testimony pertaining to an attempted bribe.

This evidence was not admissible because no causal connection could be made between the purported offer of bribe and the crime with which defendant was ultimately charged.

Evidence of attempted bribery, if admissible at all as a collaterial matter to the prosecution for another offense, can only be offered for the purpose of showing a consciousness of guilt.

Wigmore classes it as "Conduct Evidencing a Weak Cause" and places it in the same category as flight. Wigmore, Sections 276 and 278, Volume 2, 3rd Edition. Wharton classes both attempts to bribe and flight as "Conduct of the Defendant Subsequent to

Act." Sections 301 and 306, Volume 1, Wharton's Criminal Evidence, 11th Edition. Wharton states as follows:

> "Flight because of one crime is not admissible in evidence as guilt in another." Section 301.

If there is going to be a showing of consciousness of guilt it seems apparent that if an offer of bribe were made to atone for a different crime than the one for which defendant is being prosecuted, the introduction of such evidence is without the issues and would be most prejudicial, as it introduces evidence concerning a crime with which defendant is not charged. In the case of flight, if defendant ran away to avoid prosecution for one crime and was prosecuted for another, the evidence of flight is not competent.

In the case of *State v. Whitney*, 254 Pac. 525, (Idaho 1927) evidence of flight was held prejudicial where it could not be shown that the defendant was fleeing from the crime for which he was subsequently charged. The Court said as follows:

> "Flight in respect to another and different offense is not to be considered as evidence of the guilt of an offense from which there was no flight. 16 C. J. Sec. 1066, pp. 552, 553; *People v. Vidal*, 121 Cal. 221, 53 P. 558. It appears from the state's evidence that appellant was not conscious of guilt of the crime of obtaining money by false pretenses, but was conscious of guilt of having left the state with an automobile of which he was not the owner." *State v. Whitney*, 254 P. 525, p. 527.

In our case, the first time the witness Nielsen met the defendant he informed the defendant as follows:

> "I told Mr. Barcott the purpose of investigating such transactions was to determine if the money was used in black market activities, and if the money was properly reported for income tax purposes." (Tr. 72).

On cross-examination he admitted that he told defendant he was investigating the large bills with reference to Internal Revenue matters, black market or some similar matter. (Tr. 79). Defendant's testimony is that nothing was said to him about income taxes. (Tr. 228). He didn't know why he was being investigated on that first visit. (Tr. 287).

Assuming the truth of the agent's testimony, as we must in this argument, how can any living person say, that if a bribe was actually offered that it was to avoid prosecution on an income tax evasion charge? How can any court say that it was not offered to atone for illicit black market activities? It could have been for either crime, or even some other Internal Revenue matter.

It is submitted that under the predicate laid for the admission of this testimony the original objection to its admission should have been sustained. (Tr. 75). In any event, the motion to strike it and instruct the Jury to disregard it should have been granted. (Tr. 77).

Following our argument in support of judgment of

acquittal, or in the alternative for a new trial, the court's misapprehension as to the testimony is clearly indicated in its following statement:

> "I cannot recall a word of testimony by the Internal Revenue agents that they ever stated to the defendant that they were investigating him for black market activities. (Tr. 470).

The second argument against the admissibility of this testimony is that no *corpus delicti* was ever established in the case. Of course the order of proof is discretionary with the Trial Court. The argument on this point presents a moot question at this time as the failure to prove the basic elements of the crime, as alleged, automatically called for a judgment of acquittal.

The ultimate result is that the case went to the Jury without proof of unreported income in a substantial amount as alleged, and the inadmissible evidence of bribery is what drove home a conviction for the prosecution.

ASSIGNMENT OF ERROR NO. IV

The Court erred in failing to limit the prosecution to a showing that unreported income, if any, was derived from the sources set forth in the Bill of Particulars. (166-171).

In this case defendant was furnished with a Bill of Particulars wherein the prosecution enumerated the sources from which they claimed he received unre-

ported income. (Tr. 17). From what has already been said, it is apparent that there was no showing that unreported income, if any there was, came from any of the enumerated sources.

Proof as to failure to report sufficiently for interest and dividends was totally lacking, so sources listed for these items are not material. We are then confronted with the sole question of whether appellant received unreported income from the restaurant known as the California Oyster House.

The witness Swanson repeatedly admitted he didn't know from what sources the money came for bond purchase, always assuming it was from the restaurant.

When no proof was offered that defendant failed to report all of his income from the restaurant business our various motions for judgments of dismissal were made. The Court denied these motions. The Court was of the opinion that a Bill of Particulars does not have the efficacy that it once had in our system of jurisprudence. The Court said as follows:

> "I might suggest to counsel that in the earlier days of the practice of criminal law, the office of a bill of particulars in the Federal Courts was more strictly construed than it is under the new rules of civil procedure. The Government is not required to prove the shortage in the return was the exact sum that was set forth." (Tr. 170).

We agree with the Court's statement that the prose-

cution need not prove the exact amount alleged in the bill, so long as it is substantial, but that is not the question. Our problem is a total lack of proof indicating failure to report from the source particularized. We submit, on the basis of the following authorities, that the Trial Court was in error when it stated that under the new rules a Bill of Particulars has lost its efficacy and that it can be disregarded, once it is given.

In the case of *United States v. Pierce*, 245 Fed. 888 at page 890, the following language is used:

"When the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused, the court may direct that a bill of particulars be furnished him so that he may properly prepare his defense. *Kettenbach v. United States*, 202 Fed. 377, 382, 120 C.C.A. 505. The granting or refusal of the bill of particulars rests in the sound discretion of the court. *Rosen v. United States*, 161 U. S. 29, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Breese v. United States*, 106 Fed. 680, 682, 45 C.C.A. 535. When a bill of particulars is once made and served, 'it concludes the rights of all parties who are to be affected by it; and he who has furnished a bill of particulars under it must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration.' *Commonwealth v. Giles*, 1 Gray (Mass.) 466, cited and approved in *Dunlop v. United States*, 165 U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799. In *United States v. Adams Express Co.* (D.C.) 119 Fed. 240, it is said:

" 'The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts, more or less in detail, he will be re-

quired to meet, and the court will limit the government in its evidence to those facts set forth in the bill of particulars.' "

The following cases are all in accord with the above mentioned rule of law and specifically set forth that in the trial of the case the Court will limit the Government to its evidence to those facts set forth in the Bill of Particulars.

United States v. Adams Express Co., (Dist. Court, S. D. Iowa, E.D. 1902), 119 Fed. 240.

Kettenbach v. United States (C.C.A. 9, 1913), 202 Fed. 377.

Braatenlien v. United States (C.C.A. 8, 1945), 147 F. (2d) 888.

United States v. McKay (Dist. Court. E. D. Mich., S. D. 1942), 45 Fed. Supp. 1001.

United Sttacs v. Gouled (Dist. Court, S. D. N. Y. 1918), 253 Fed. 239.

United States v. Allied Chemical & Dye Corp. (Dist. Court, S.D. N.Y. 1941), 42 Fed. Supp. 425.

With all due respect to the opinion of the learned Trial Court, we have found nothing which indicates that the rule pertaining to the office of the Bill of Particulars is in any wise different than it was at the time when the above mentioned cases determined that the Government was bound and restricted by its Bill of Particulars. Rule 7 (f) of Criminal Procedure provides as follows:

> "The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

At page 228 of the 1947 Cumulative Annual Pocket Part of Title 18 of the U. S. Code Annotated, the following note of Advisory Committee on Rules appears:

> "*Note to Subdivision (f).* This rule is substantially a restatement of existing law on bills of particulars."

We are unable to find any authority, modern or otherwise, which permits the Trial Court to disregard the Bill of Particulars, once given. To allow the Government to prove its case by going outside the Indictment as limited by the Bill of Particulars results in a fatal variance between the pleading and the proof, which entitles the defendant to a judgment of acquittal.

In *Guilbeau v. United States* (C.C.A. 5, 1923), 288 Fed. 731, the defendant was charged with the sale of morphine sulphate, and the evidence introduced showed a sale of morphine hydrochloride. The Court said at page 732 of the decision as follows:

> "We are of opinion that the variance was material. Morphine is a derivative of opium. According to the evidence, morphine sulphate is a compound which contains morphine and sulphuric

acid, while morphine hydrochloride is a compound which contains morphine and a radical combined with a chloride. The description of one of the compounds in which morphine is a constituent element excludes all other compounds, and must be proved as laid, even though the indictment might have used more general terms. *United States v. Hardyman*, 13 Pet. 176, 10 L. Ed. 113; *Naftzger v. United States*, 200 Fed. 494, 118 C.C.A. 598; 1 Bishop's New Criminal Procedure, Sec. 488; 1 Wharton's Criminal Evidence, Sec. 121; *Fulford v. State*, 50 Ga. 591; *Robinson v. States*, 60 Tex. Cr. R. 592, 132 S. W. 944. The averment is one of substance, *Jin Fuey Moy v. United States*, 254 U. S. 189, 41 Sup. Ct. 98, 65 L. Ed. 214; and the variance is not cured by the Act of February 26, 1919, 40 Stat. 1181 (Comp. St. Ann. Supp. 1919, Sec. 1246), Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.

"The defendant was put on notice by the indictment that the charge against her was the unlawful sale of a particular compound, and a conviction cannot be sustained upon proof of a different compound than that charged. If the rule against a material variance be considered technical, yet it is sound, because it is based upon the constitutional guaranty that an accused shall be informed of the nature and cause of the accusation against him, and only by adhering to it can the danger of misleading a defendant be avoided."

On the basis of the foregoing authorities, which set out the general rule, it would seem to us that the prosecution would not have been permitted to introduce evidence pertaining to unreported income received by the defendant from a gambling venture, fishing venture, barber shop, clothing store, or other possible sources.

How much worse the evil becomes when the prosecution attempts to show unreported income generally, making it utterly impossible for the defendant to know where or how to defend, merely assuming that it came from the particularized source. The assumption gives us nothing upon which we can base an answer.

To come into Court with generalities, possibilities and assumptions upon which the Jury is allowed to speculate violates the rules hereinbefore announced relative to Bills of Particulars. The case was not proved and judgment of acquittal should have been ordered either at the close of plaintiff's case, at the close of all evidence, or after verdict of the Jury.

ASSIGNMENT OF ERROR NO. V

The Court erred in allowing Exhibit No. 11 pertaining to defendant's entry into a safe deposit box to be admitted in evidence. (Tr. 104).

The witness Nielsen's testimony in substance is that on January 28, 1946, he questioned the defendant concering certain bills which defendant stated he had in a safe deposit box. (Tr. 71). Defendant volunteered to show them to Nielsen and they went to the box for this purpose. (Tr. 72). *There is nothing in Nielsen's testimony to show that defendant was questioned as to any other assets or concerning any other box, the purpose here being only to identify the bank notes.*

On February 13th when Nielsen and Swanson made an inventory of the contents of the original box they asked about other boxes and defendant informed them that he had another in the Washington Building which he allowed them to examine. Nothing was found therein except business papers. (Tr. 114-115).

The witness Kerr was called to show that defendant had entered the Washington Building safe deposit box on January 13th. Exhibit No. 11 was offered for this purpose and admitted over defendant's objection. (Tr. 103-104). It is defendant's contention that this evidence was erroneously admitted.

Wigmore in Volume 1, Sec. 9, p. 289 (3rd Edition), states that the following rule is axiomatic:

> "None but facts having rational probative value are admissible."

It directly proves only one fact, namely, that the defendant entered his own safe deposit box on January 13, 1946, which fact has no probative value.

As was said as early as 1875 in *Levison v. State*, 54 Ala. 528:

> "The rule is clear and well-defined that facts and circumstances which when proved are incapable of affording any reasonable presumption or inference in regard to the material fact or inquiry involved are not admissible as evidence."

In the case of *Jones v. United States* (C.C.A. 5, 1947) 164, Fed. (2d) 398, the court granted a new trial and said as follows:

"* * * it was of the greatest importance to a just and fair trial that defendant be protected from prejudice arising out of other matters not germane to the trial, and that his defense, his reasons for not returning the income until 1945 and for the other things that he had done, he fully and fairly submitted to the jury.

"Instead of being tried in this way, the prosecution was allowed, without adequate check or curative action, to bring into the cause collateral matters which they deemed would be, and which were, damaging to the defendant." *Jones v. United States*, 164 Fed. (2d) 398, p. 400.

Only one conclusion can be reached regarding this evidence, namely, that it was injected into the case for the sole purpose of prejudicing the minds of the Jury against the defendant. This conclusion is strongly supported by argument of counsel to the Jury. (Tr. 417, 420, 432, 433).

ASSIGNMENT OF ERROR NO. VI

The Court erred in failing to give defendant's requested Instruction No. 2, and thereby failed to instruct the Jury that they must find that the war bonds purchased by the defendant were acquired with net income derived by the defendant from sources set forth in the Bill of Particulars. (Tr. 29-32).

The Court failed to give portions of defendant's Instruction No. 2, as indicated by the Court's remarks thereon:

"You are instructed that the prosecution relies upon what has been referred to by the Govern-

ment's witness as the 'net worth' of the defendant on a certain date; that is, that the defendant's 'net worth' or that the total assets owned by the defendant on December 31, 1942, were of a stated amount, and that between January 1, 1943, and the 31st day of December, 1943, his assets or 'net worth' had increased to an amount over and above what he reported was his net income for that year; likewise, the prosecution contends that his net worth on the 1st day of January, 1944, was a stated amount, and that at the end of that year his 'net worth' or assets had increased to an amount greatly in excess of the amount which he reported was his net income for the year. The same contention is made for the year 1945.

Given in substance.

You are instructed that the prosecution must prove to you, beyond all reasonable doubt, the following facts:

(a) That the defendant on December 31, 1942, did not own or possess any greater amount of assets or 'net worth' than that which the prosecution claims the defendant owned on that date.

Refused.

(b) That between the 1st day of January, 1943, and the 31st day of December of that year, the assets or 'net worth' of the defendant increased substantially to an amount in excess of what he reported was his net income for that year.

Given in substance.

(c) That the assets purchased for the year 1943 were purchased and acquired with net income of the defendant derived from the following sources:

Refused.

1. Dividends from the Fishermen's Packing Corporation of Anacortes, Washington;

2. Interest from savings accounts in the National Bank of Washington, Tacoma, Washington, from a real estate contract and personal property conditional sales contract in which Antone Barcott was the purchaser;

3. Interest on bonds from U. S. Savings Bonds, Series G;

4. Net income from his business known as the California Oyster House, 940 Pacific Avenue, Tacoma, Washington, and from no other sources.

(d) That the defendant wilfully and knowingly, for the purpose of evading a large amount of tax, did file or cause to be filed with the Collector of Internal Revenue a false and fraudulent income tax and victory tax return wherein he stated that his net income for that year was substantially less than the net income of the defendant.

The same rule of law applies for the calendar years 1944 and 1945.

A 'substantial amount' means an amount substantially in excess of what the defendant actually paid.

Unless the Government has proven to you, beyond all reasonable doubt, the foregoing facts, it is your duty to acquit the defendant.

Refused." (Tr. 30, 31, 32).

The defendant excepted to this failure to instruct. (Tr. 411). By failing to give Section (c) of this instruction the Jury was allowed to convict the defendant without proof that unreported income, if any, was derived from the sources enumerated in the Bill of Particulars. The field has been thrown wide open to the Jury. Unreported income from any source whatsoever is deemed sufficient. The defendant has been trapped by being led to believe that he would come into Court and defend on certain specified matters, and then being faced with a conviction concerning matters about which he was never informed.

Our argument concerning the fourth Assignment of Error pertaining to Bills of Particulars is also appropriate to this Assignment of Error.

ASSIGNMENT OF ERROR NO. VII

The Court erred in instructing the Jury that the defendant could be convicted if it were shown to them that the defendant purchased war bonds in excess of his reported income for a taxable year. (Tr. 450-451).

The Court gave the following instruction to the Jury:

> "It calculated the net worth of the defendant at the close of the tax year of 1942, and the beginning of the tax year 1943, and then, calculating from that basis, as a net worth, at the close of each of the succeeding three years, it charges the defendant with earnings as evidenced by the in-

crease in his net worth for each of these years. The Government therefore relies upon the fact that when such an increase is shown, it has established circumstantially that such income was taxable income and was acquired by the defendant in each of the years 1943, '44 and '45.

"Now an essential element of the offense herein is that the defendant's taxable income was greater than that which he reported. If such fact is not proven, then you would find the defendant not guilty.

"If you find from the evidence that the increased net worth of the defendant in the years in question here measured the taxable income of the defendant in a substantial amount over that reported by the Collector—by him to the Collector of Internal Revenue, such fact would be one of the essential elements in the charge which the Government makes. You would then consider it together with all of the other facts and circumstances given in evidence in this case, and then determine whether his actual taxable earnings during the years '43, '44 and '45, are established by the evidence to your satisfaction beyond a reasonable doubt when measured by the net worth at the beginning and ending of the year." (Tr. 450-451).

The giving of this instruction was simply a continuation of the Court's errors as set forth in the Assignments of Error Nos. I, II and IV. The instruction embodies the theory that a mere showing of the purchase of war bonds in excess of reported income for a taxable year made out a *prima facie* case against the defendant. The Court told the Jury if they found from the evidence that the increased net worth of the defendant measured the taxable income in a substan-

tial amount over that reported, such fact would be one of the essential elements in the charge against the defendant. The difficulty with the proposition is that the Jury has no way or means of knowing whether the bond purchases were from taxable income earned during the years in question and not reported to the Collector. The mere possession of assets shown to have been acquired in a particular year offers no proof that such acquisition was from current earnings, let alone that it was from unreported earnings. All that the Jury did or could have done was to hazard a guess as to when the money for the purchase of said bonds was obtained.

It is to be noted further that no reference is made in the instruction that the Jury must find unreported income to have come from the sources enumerated in the Bill of Particulars. In the first paragraph of said instruction the Court sets out the Government's theory as follows:

> "The Government therefore relies upon the fact that when such an increase is shown, it has established circumstantially that such *income* was taxable income and was acquired by the defendant in each of the years 1943, '44 and '45." (Tr. 450-451). (Italics ours).

Here the Court treats the acquisition of assets actually as income, failing to mention that it is for the Jury to find whether the acquisition was or was not income. By so doing the Court usurps a question of fact from the Jury's province.

ASSIGNMENT OF ERROR NO. VIII

Prejudicial error which could not be cured by an instruction from the Court to the Jury to disregard counsel's remark was committed by counsel for the prosecution when he in substance told the Jury that a failure to convict would indicate they did not believe in our system of Government any longer.

In concluding his argument to the Jury counsel made the following prejudicial argument:

> "You and I know, when we see these hearings on communism back in Congress today. We hear about what is going on all over the world, and our system of government today is standing a test. We are being tried. If people feel that you can walk into a court room like this and walk out and get away with what this man did, they don't believe in our system any more.
>
> MR. GAGLIARDI: I object to counsel's remarks as improper and prejudicial and not called for, and not supported by the evidence, and as appealing to the passion and prejudice of the jury, and I am excepting to his argument, your Honor.
>
> THE COURT: The last remark of counsel the jury will disregard." (Tr. 434-435).

As we view the foregoing statements of counsel, it appears that the Jury were told in substance that they would either convict the defendant or else be placed in the position of being found to have lost faith with our system of Government. This is in utter disregard for the rule that guilt must be determined on the evi-

dence and it nullifies the instructions pertaining to reasonable doubt and presumption of innocence. Whether the Court's comment to disregard the last remark was sufficient to eradicate the prejudice raised by the argument is extremely problematical.

We quote the following from the case of *Singer v. United States* (C.C.A. 3, 1932), 58 Fed. (2d) 74, which appears to be appropriate at this time:

> "Innocent men may be indicted and convicted, and guilty men may be acquitted, but both good and bad men are alike entitled to the application of the rules of evidence which courts throughout the ages have found to be best for the fair and impartial administration of the law. When these rules, under the stress and strain of a trial, have been violated, it does not cure the injury to reply with the stereotyped argument that it does not appear it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is 'that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless.' *Miller v. Territory of Oklahoma* (CCA), 149 F. 330, 339, 9 Ann. Cas. 389; *Coulston v. U. S.* (CCA), 51 F. (2d) 178, 182." *Singer v. United States*, 58 F. (2d) 74, p. 77.

When the direct representative of our Government tells the Jury that a failure to convict is tantamount to being classed as subversive, it appears to us that a digression on the facts in the case amounts to prejudicial error which is incurable, and we submit it to the consideration of this Court on that proposition.

CONCLUSION

We respectfully submit to this Honorable Court that the *corpus delicti* was not established by the prosecution; that evidence of the acquisition of war bonds in excess of returned income for a given year is no proof that said assets were acquired with current income, or that said income was taxable income, or that the acquisition was made from unreported earnings; that the acquisition of said assets is perfectly consistent with innocence and is not such a circumstance as points to guilt to the exclusion of every other hypothesis.

We further respectfully submit that in an income tax evasion case evidence of an attempt to bribe for the purpose of showing a consciousness of guilt is inadmissible where the predicate to said testimony shows that the defendant was being questioned and investigated for crimes other than income tax evasion at the time of the reported attempted bribe, and it is unknown for which crime he may have attempted atonement.

It is also submitted that evidence pertaining to the defendant's entry into his own safe deposit box, without any showing that the defendant either placed therein or removed any assets therefrom, was inadmissible, as it was a collateral matter without probative force or effect, from which no reasonable infer-

ence could be drawn which would tend to prove the defendant guilty of income tax evasion, the only purpose which it could have served being to prejudice the minds of the Jury against the defendant and to find him guilty on conjecture and speculation.

It is also respectfully submitted that when a Bill of Particulars is once given to a defendant that the prosecution is thereafter limited thereby and that where the Bill of Particulars sets out the sources from which it is claimed that the defendant failed to report income, a failure to show unreported income from the enumerated sources is a total failure of proof, and evidence that there may have been unearned income from another source or any source generally is at fatal variance with the pleadings.

It is also submitted that where a witness is permitted to draw a conclusion from his own testimony that said conclusion cannot be admitted in evidence unless it reasonably appears that the facts upon which it is based are sufficiently complete to afford an accurate deduction therefrom, and that the witness Swanson's testimony pertaining to the defendant's net worth as of December 31, 1942, was based entirely upon his conjecture and without knowledge of the facts, which would make his conclusion untrustworthy and therefore inadmissible.

As acquisition of war bonds in excess of income for a given year fails to establish a *prima facie* case of

income tax evasion, the Trial Court's instruction to the effect that it does establish such a case, and that the Jury is authorized to convict the defendant thereon, places the burden upon the defendant to prove his innocence.

We also submit that a failure to instruct the Jury that they must find unreported income, if any, to have come from the sources enumerated in the Bill of Particulars permitted the Jury to speculate and consider sources concerning which the defendant had no knowledge, and against which the defendant was not prepared to defend.

When the United States District Attorney tells the Jury in substance that they must either convict the defendant or be classed with those opposed to our system of Government, we submit further that this prejudicial departure from the facts and the law of the case was incurable.

Therefore, we most earnestly submit that by reason of the total failure of proof of the charges made against the defendant, the judgment and sentence of the Trial Court are erroneous and should be set aside, with directions given to the Trial Court to enter a judgment of acquittal. In the alternative, a new trial should be granted because of the errors committed in the admission of irrelevant and prejudicial evidence and because of misconduct on the part of the United

States District Attorney in making his argument to the Jury.

Respectfully submitted,

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and
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